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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 239.

ALVIS MAYNARD, ADMINISTRATOR OF MARY A. RONAN, DECEASED, PETITIONER,

vs.

W. K. ELLIOTT, TRUSTEE IN BANKRUPTCY OF NANCY JANE VARNEY AND PRICY A. VARNEY, RESPONDENT.

No. 240.

JOHN B. VARNEY, PETITIONER,

vs.

W. K. ELLIOTT, TRUSTEE IN BANKRUPTCY OF NANCY JANE VARNEY AND PRICY A. VARNEY, RESPONDENT.

No. 241.

J. M. SMITH AND A. B. SCOTT, PETITIONERS,

vs.

W. K. ELLIOTT, TRUSTEE IN BANKRUPTCY OF NANCY JANE VARNEY AND PRICY A. VARNEY, RESPONDENT.

No. 242.

A. G. RUTHERFORD, PETITIONER,

vs.

W. K. ELLIOTT, TRUSTEE IN BANKRUPTCY OF NANCY JANE VARNEY, RESPONDENT.

PETITIONERS' REPLY BRIEF.

RANDOLPH BIAS,
Counsel for Petitioners.
WELLS GOODYKOONTZ,
Associate Counsel for Petitioner A. G. Rutherford.
GOODYKOONTZ & SLAVEN,
Of Counsel.

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PETITIONERS' REPLY BRIEF.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States of America:

In this brief we shall follow the subject titles adopted by the Respondent rather than adhere to the arrangement in the brief tendered with the Petition.

Much of the argument in Respondents' brief we anticipated in our first brief, and, therefore, there is no reason why, in this Reply, the same should be repeated. There are, however, certain features of counsels' argument which call for reply and certain additional matters which we shall bring to the Court's attention.

I.

Provability of Claim Arising Upon Bankrupts' Endorsement of Unmatured Negotiable Note.

Under this heading it is asserted that the claim is a contingent one, for the reason that there is not endorsed upon the note any waiver of protest, and that, *although the maker be bankrupt,* with no estate, *the holder may not cause the note to be protested,* in which event the endorser would be released or discharged, and, consequently, the note is non-provable. On the contrary, we assert, that the undertaking is an express contract, in writing; that its terms are certain, definite and fixed; that it is a commercial contract entered into prior to the filing of the bankrupts' petition; that the name of the endorser signifies his intention to pay; that the holder, if he choose, may bring action, in case of default, against the endorser alone; that the extent of the endorser's liability is at all times known, for it is measured by the note itself; that the endorser's liability constitutes a *provable debt,* although default has not been made by the principal; that the note constitutes a *demand or claim,* even if not a debt, within the purview of the Act. As for the contention that the note may never be protested, therefore that liability is contingent, we reply that that contention will not hold

good. It is true that the holder might neglect to cause protest, and thereby release or discharge the endorser, but until such act of omission occur the status of the endorser is one of liability. One had just as well say that all notes import a contingent liability, even as regards the maker. For example, the note might be allowed to expire under the Statutes of Limitation, and the right of recovery barred; or, *reductio ad absurdum*, that an alien enemy might overthrow this Government and decree the abrogation of all contracts. The argument of counsel, for whom we have great respect, we believe not to be sound. That argument is based, largely, upon *Dunbar vs. Dunbar* and *Zavelo vs. Reeves*.

Dunbar vs. Dunbar.

(190 U. S. 340.)

In *Dunbar vs. Dunbar*, the facts were that a husband entered into a contract with his wife to pay unto her alimony for life or for so long as she remained unmarried. This Court in substance held, that perhaps the annuity would be provable, but that the impossibility of ascertaining for how long the woman would remain single was beyond human computation, and, therefore, that the claim was not susceptible of proof. For a further discussion, see our original brief, page 22.

Zavelo vs. Reeves.

(227 U. S. 625.)

In *Zavelo vs. Reeves*, very much relied upon by counsel, the facts are that Zavelo on November 22, 1905, filed his petition in bankruptcy in the Northern District

of Alabama and was duly adjudged a bankrupt. On January 1st (observe that it was five weeks *after* the petition was filed and after adjudication, but before discharge) Zavelo promised Reeves that if he would lend him five hundred dollars with which to make composition with his creditors, he, Zavelo, would repay the sum to Reeves. In other words, the bankrupt was borrowing money from one of his creditors to make composition with all of his creditors, and made this arrangement *after* his petition in bankruptcy was filed. It was this fact, and only this fact, which caused Mr. Justice Pitney, speaking for the Supreme Court, to say:

> "Debts founded upon open account or upon contract, express or implied, which are provable under the Bankruptcy Act of 1898, include only such as existed at the time of the filing of the petition in bankruptcy."

In the case cited the debt was non-existent at the time the Bankrupt filed his petition. The allowance of his claim would have been contrary to the terms of the Act.

The forms for proof, prescribed by this Honorable Court, namely, Nos. 54, 55, 56 and 57, recite that the bankrupt "*was at and before the filing of said petition and still is, justly and truly indebted to said deponent*", etc. The language quoted varies slightly where the claimant is a copartnership or a corporation. We respectfully insist that the Zavelo decision plainly is not applicable to the pending cases. We say that the quotation from the opinion, page 13, Respondents' Brief, when analyzed, shows that, although Clause 4 of Sec-

tion 63 does not carry the phrase—incorporated in Clause 1, of the section, reading thus—"*absolutely owing at the time of the filing of the petition* against him," yet that the intention of the law-making body appears from a reading of the entire section and, consequently, the court held that "Clause 4 describes simply debts that are 'founded upon an open account, or upon a contract, express of implied', *not in terms referring to the time of the inception of the indebtedness.*"

And then follows this language: "But reading the whole of Section 63, and considering it in connection *with the spirit and purpose* of the Act, we deem it plain that the debts based on open accounts *or upon contract, express or implied,* that are provable under Section 63-*a*, clause 4, include only such *as existed at the time of the petition in bankruptcy.*"

The fact that this Court, in construing the act according to its "spirit and purpose", read into the clause certain language—which appeared elsewhere in the section—does not imply that Clause 4 is nugatory as concerns the provability of debts based upon contract.

Counsel have not offered any sufficient reason why Clause 1 should be deemed paramount to Clause 4. Evidently, the object of Congress was to make provable all classes of debts, that are inherently capable of proof. It is true that Congress could not mould legislation to fit the claim of alimony, contingent upon the non-marriage of a woman, as in *Dunbar vs. Dunbar.* Furthermore, Congress has provided even a method

for the ascertainment and proof of claims, theretofore unliquidated. *Vide*: Sec. 63*b*.

Williams vs. United States Fidelity and Guaranty Co.

(236 U. S. 549.)

The captioned case is cited in our original brief as supporting jurisdiction, but it is also an authority in behalf of the Petitioners on the main proposition, namely, that the claims are provable. The facts in the Williams case are, as appears from the opinion of Mr. Justice McReynolds, as follows: Williams and his partner gave to the surety company their personal bond to indemnify it against loss because of its becoming their surety. Williams and his partner breached the contract and thereafter Williams went into bankruptcy. Despite the breach, and resultant debt, the surety failed to prove its debt in the bankruptcy proceeding. Later the surety sued the bankrupt for the money it had been required to pay as surety. Naturally the court held the surety company could not recover but was estopped by the bankruptcy of Williams in that it had failed to prove a provable debt against the bankrupt when his estate was being administered in bankruptcy. Mr. Justice McReynolds, writing the opinion for the court, said:

> "It would be contrary to the basal spirit of the bankrupt law to permit a surety, by simply postponing compliance with his own promise in respect of a liability until after bankruptcy, to preserve a right of recovery over against his principal, notwithstanding the discharge would have extinguished this if the surety had

promptly performed as he agreed. Such an interpretation would effectually defeat a fundamental purpose of the enactment."

Earlier in the opinion it is said:

"Counsel for the company 'contend that the claim at bar was subject to two contingencies, one of which, to wit, the sustaining or incurring of actual pecuniary loss, resultant to the principal's act, had not arisen at the time of the filing of the petition. Therefore said claim was not an unliquidated claim upon an express contract absolutely owing at the time. It was a contingent claim, and as such not provable, and therefore not affected by the bankrupt principal's discharge.'

"If the doctrine announced by the court below and maintained here by counsel is correct, a discharge in bankruptcy may have very small value for the luckless debtor who has faithfully tried to secure his creditors against loss; and, in effect, a demand against him may be kept alive indefinitely, according to the interest or caprice of his surety.

"It is the purpose of the bankrupt act to convert the assets of the bankrupt into cash for distribution among creditors, and then to relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes."

See also Thiesen v. Vierell Bank etc. 206 N.S. p 28.

It seems to us that the Williams' case effectually disposes of the contention of the respondents.

Counsel, also, cite and rely upon a recent case: *In re Adair Real Estate and Trust Co.* (D. C. Ga.), 35 F. (2) 531. Counsel says that the case of *Elliott vs. The*

First National Bank, decided by the Circuit Court of Appeals for the Sixth Circuit, was cited with approval in the Adair case. An examination of the Adair case will show that the claims of Neuman and others were held provable. The bankrupt was a guarantor of an issue of bonds. It is true that the court cites the case of the *First National Bank vs. Elliott* and other cases offered to sustain the proposition of non-provability, but the court rested the decision on other authorities, including the Williams case, above mentioned.

II.

Provability of Claims Based on Bankrupts' Endorsement of Negotiable Instruments Maturing More Than One Year After Adjudication.

Under this caption counsel for respondent attack the "provability" of two of the items, namely:

(*a*) John B. Varney note of $3,000.00, matured October 3, 1926.

(*b*) Smith and Scott, 2 notes, $2,400.00 each, matured October 3, 1926 and 1927, respectively.

In support of respondent's objection to the allowance of these items counsel quote the provision of the act which reads thus: "Claims shall not be proved against a bankrupt estate, subsequent to one year after the adjudication." Our answer is, that the record shows that proof of the claims was filed well within the time limit of one year. That of John B. Varney was filed on August 18, 1925 (R. p. 9); that of Smith and Scott was likewise filed on August 18, 1925 (R. p. 15). The date of the filing of the Petitions, in Bank-

ruptcy, is not shown, but the adjudication took place on August 3, 1925. The proofs (in all four cases) were filed at the first meeting of the creditors, held fifteen days after adjudication. Our search has failed to reveal any statute other than the one mentioned or decision purporting to limit the right of proving a debt, the terms of which were definite and fixed, not due at the time of the filing of the petition or maturing beyond one year after the adjudication.

Collier says:

> "In addition to claims upon which actions could be brought, *debts existing at the time of the filing of the petition but not then payable are provable* in bankruptcy, and being provable the holder of such debts may be a petitioner to have the debtor involuntarily adjudged a bankrupt."

The theory, of respondents' counsel, that a debt may not be proved until after it falls due, and that if it mature more than one year after adjudication it cannot be proven at all, we believe, cannot be upheld.

III.

Laches.

Vide: Opinion, pp. 29-30.
Our original brief, p. 25 *et seq.*

IV.

Effect of Former Petition to Re-examine.

The Rutherford Claim. Case No. 242.

Vide: Agreed Statement of Record on Appeal, R. pp. 21-26. Opinion, pp. 29-30. Our original Brief, R., p. 35 *et seq.*

The Referee, having considered "the equities of the case", refused the petition to re-examine. The District Court affirmed him, but the Circuit Court reversed, regardless of the views of the Referee and District Court.

El Dorado Ice & Coal Co.

(290 Fed. 180.)

The Circuit Court of Appeals, Eighth Circuit, in the opinion written for the court by Circuit Judge Stone, said, p. 181:

> "This petition for reconsideration was filed after the time had expired for appealing from the order confirming allowance of the claim. To assure control and equitable disposition of claims, section 57k of the Bankruptcy Act (Comp. Stat. Sec. 9641k) provides that:
>
> "'Claims which have been allowed *may be reconsidered for cause* and reallowed or rejected in whole or in part, *according to the equities of the case,* before but not after the estate has been closed.'
>
> "This provision, obviously, was not intended to give an undeniable right to such reconsideration. Not only does it expressly state that such reconsideration *'may' be allowed 'for cause',* but to hold the right as absolute *would be to nullify the provision in section 25a* of the act (Comp. Stat. Sec. 9609a), which requires appeals from orders of confirmation to be taken within ten days. Also, such a view of section 57k *would tend to delay (through repeated petitions for reconsideration and appeals therefrom)* the speedy distribution of the estate

which is one of the prime purposes of the Bankruptcy Law (Wiswall v. Campbell, 93 U. S. 347, 350, 23 L. Ed. 923). Therefore, we construe section 57k as submitting the matter of allowing reconsideration *to the sound discretion of the court. Without here deciding that the exercise of such discretion can be reviewed,* where the court declines to reconsider the allowance but treating, for the purposes of this case, the right of such appeal to exist, we turn to a consideration of whether that discretion was erroneously exercised here. So far as the petition for reconsideration involves questions of law, such were presented to the referee and court upon the allowance of the claim. *If the appellant was dissatisfied with the determination of them at that time he should have appealed* therefrom and not delayed distribution."

The action of the Circuit Court, in reversing Judge Cochran on this point, is palpable error, as the Petition for the Writ of Certiorari distinctly points out. Furthermore, the Circuit Court "has decided an important question of Federal law which has not been, but should be, settled by this court." Supreme Court Rules, 34, Sec. 4, Par. (*b*).

The Court, deciding the El Dorado case, even questions the right to have reviewed the action of the *nisi prius* court in declining to reconsider the allowance of a claim.

V.

Additional Strong Equities Pertaining to 240 and 241.

As shown by the record, after one year had elapsed after the filing of the petitions in bankruptcy by the

bankrupts the claimant in No. 240 and as to one of their three notes (that maturing October 3, 1926—fourteen months after petitions filed) in No. 241, did not withdraw these notes, present them for payment, have them protested for non-payment, and have notices of dishonor given these bankrupt endorsers. This was not done for the reason claimants believed, in fact, thought they knew, if objection or motion to reconsider was to be made it must be made within twelve months—the time then allowed for proving claims—and within which time Mr. Collier says objections after allowance should be made.

The claimants in No. 241 had protested the note maturing two months after petition filed, and then, after these petitions to reconsider were filed, had duly protested the note maturing twenty-six months after bankruptcy petitions were filed.

This omission, for the reasons stated, to protest these two notes and thereby render the endorsers liable after their discharge, if in fact they are not provable against the bankrupts' estates, is another strong equity intervening to cause the unprecedented delay in the trustee to amount to laches in moving for reconsideration of the claims. If the notes are not provable in bankruptcy they are not barred by the bankruptcy, and, but for this laches of the trustee in objecting, would have been protested and the bankrupts held liable therefor after their discharge. There was no protest. Therefore, the bankrupts after their discharge are not liable, and now to hold the notes nonprovable debts is to say finally to the claimants, the notes may not be collected, in whole or in part, either

from the estate of the bankrupts before or after their discharge. Here is the delay that works a disadvantage and prejudices the rights of the claimants, resulting in a changed condition of the parties to which they cannot be restored. The delay is inequitable and estops the trustee, according to Mr. Pomeroy, Section 1442.

All the equities loudly call for estoppel against the attempted assertion of the right, to reexamination and rejection, made by the trustee, in all four of these cases, but most loudly for the additional reason herein stated, as to these two notes, one each in Nos. 240 and 241.

Respectfully submitted,

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CHARLES ELMORE

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ALVIS MAYNARD, Administrator of Mary A. Ronan, Deceased, *Petitioner,*

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MEMORANDUM BRIEF FOR RESPONDENT ON PETITION FOR CERTIORARI.

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TABLES OF CASES.

Adams vs. Adams, 25 Minn. 72.
Baltimore Steamship Co. vs. Phillips, 274 U. S. 316.
Bankruptcy Act, Section 1 (11).
Bankruptcy Act, Section 57 (k).
Bankruptcy Act, Section 57 (1).
Bankruptcy Act, Section 63 (a) and (b).
Canton Iron & Steel Co., 197 Fed. 767.
Cromwell vs. County of Sac, 94 U. S. 351.
Dunbar vs. Dunbar, 190 U. S. 340.
First National Bank vs. Elliott, 19 Fed. (2), 426.
General Orders in Bankruptcy No. 21, Sec. 6.
Globe Laundry Co., 198 Fed. 365.
Independent Harvester Co. vs. Tinsman, 253 Fed. 935.
Jacobson vs. Miller, 41 Mich. 90.
Re Star Spring Bed Co., 265 Fed. 137.
Zabelo vs. Reeves, 227 U. S. 625.

BRIEF OF ARGUMENT.

I.

The Bankrupt's Endorsement of a Note Not Due at the Time of the Filing of the Petition in Bankruptcy Cannot Be the Basis of a Provable Debt.

Bankruptcy Act, Section 1 (11):

> "'debt' shall include any debt, demand, or claim provable in bankruptcy;"

Bankruptcy Act, Section 63 (a) and (b):

> "(a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied, and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgment.
>
> "(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liq-

uidated in such manner as it shall direct and may thereafter be proved and allowed against his estate."

Dunbar vs. Dunbar, 190 U. S. 340;
Zabelo vs. Reeves, 227 U. S. 625;
First National Bank vs. Elliott, 19 Fed. (2), 426.

II.

Claims in Bankruptcy May Be Re-examined up to Closing of Estate.

Bankruptcy Act, 57 (k):

"Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed."

Re Star Spring Bed Co., 265 Fed. 137;
Globe Laundry Co., 198 Fed. 365;
Canton Iron & Steel Co., 197 Fed. 767.

III.

A Claim Already Re-examined in Part May Be Re-examined.

General Orders in Bankruptcy No. 21, Sec. 6:

"When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such re-examination, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the cred-

itor, and of any witnesses that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly."

Bankruptcy Act, 57 (1):

"Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part."

Baltimore Steamship Co. vs. Phillips, 274 U. S. 316;
Cromwell vs. County of Sac, 94 U. S. 351;
Adams vs. Adams, 25 Minn. 72;
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MEMORANDUM BRIEF FOR RESPONDENT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States of America:

The respondents respectfully present this their memorandum brief in opposition to the petition for writs of certiorari in the above entitled causes.

Upon page 11 of the petition and brief for petitioners appears their specification of errors. The errors relied upon are divisible into three classes: I, a determination that a note endorsed by a bankrupt and not due when the petition in bankruptcy is filed is not a provable debt against the estate of a bankrupt endorser; II, that a trustee in bankruptcy may at any time before an estate is closed obtain reconsideration of an allowed claim; III, that where a single claim is made upon two separate indebtednesses of a bankrupt, represented by separate notes, that a separate objection may be filed by the trustee, after the expunction of the claim as to one note.

I.

Question of Provability of a Bankrupt's Endorsement of a Note Not Due at the Time of the Filing of a Petition in Bankruptcy.

It is the position of the respondent that the provability of a note endorsed by a bankrupt and not due at the time of the institution of the bankruptcy proceedings, has been in effect determined by the rulings of this Court. It is conceded that there is no decision of this Court known to counsel which explicitly holds that such a claim is not provable.

The Bankruptcy Act, Section 1 (11), defines debts as a provable claim. The Bankruptcy Act, Section 63 (a) and (b) defines what debts are provable. Under sub-division (1) of that Section it is stated that debts may be proven which are "a fixed liability as evidenced by a judgment or an instrument in writing absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest, etc." The fourth sub-division says that a debt may

be proved and allowed which is "founded upon an open account or upon a contract, express or implied." It is clear that the bankrupt's endorsement is not provable under (1). It is equally clear that it is provable under (4) unless the limitations in (1) as to it being a fixed liability and absolutely owing at the time of the filing of the petition are construed as being limitations upon the character of debt which may be proven under (4). It is the position of respondent that this Court has taken the position that the limitations of (1) are to be read into the language of (4). This was the view of the Circuit Court of Appeals for the Sixth Circuit in First National Bank vs. Elliott, 19 Fed. (2) 426.

Two cases of this Court seemed to the Circuit Court conclusive. They were Dunbar vs. Dunbar, 190 U. S. 340, and Zavelo vs. Reeves, 227 U. S. 625. In the Dunbar case, in considering Section 63 (a) on page 349, this Court said, "We do not think that by the use of the language in Section 63 (a) it was intended to permit proof of contingent debts or liabilities or demands, evaluation or estimation of which it was substantially impossible to prove."

In the Zabelo case, after considering the terms of Section 63 (a), this Court said on page 631:

> "But, reading the whole of section 63, and considering it in connection with the spirit and purpose of the act, we deem it plain that the debts founded upon open account or upon contract, express or implied, that are provable under section 63 a (4), include only such as existed at the time of the filing of the petition in bankruptcy. This court in effect adopted that construction when, in promulgating the General Orders and Forms in Bankruptcy, in 1898, under the authority conferred by section 30 (Comp. St. Par. 9614), a form of discharge was prescribed (Forms in Bank-

ruptcy, No. 59), by which it is ordered that the bankrupt 'be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the day of , A. D. , on which day the petition for adjudication was filed him, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.'"

Reasoning from these cases, the Sixth Circuit determined that the bankrupt's endorsement of a note not due at the time of bankruptcy was not provable in this language:

> "In the instant case it was not possible to assess damages as of the date of the institution of bankruptcy proceedings. Then whether or not any obligation would eventuate against bankrupts was subject to an unmatured contingency, namely, whether the maker of the collateral notes would default after maturity. Even this contingency, under the Negotiable Instruments Law ripening liability of the bankrupt indorsers, was dependent, at the time of default and dishonor, and not earlier, upon the formality of notice. Bankruptcy, under the circumstances here, could not work an anticipatory breach of the indorsement contract to the result that a provable debt became established as of the date when proceedings were instituted."

It is, therefore, respectfully suggested by respondent that this Court has determined that sub-division (4) of Section 63 of the Bankruptcy Act is to be limited by sub-division (1).

II.

Time for Re-examination of Claims in Bankruptcy.

The second group of specification of errors relates to the time when a trustee may petition for re-examination of allowed claims.

It is respectfully submitted that this question is closed by the language of the Bankruptcy Act, Section 57 (k). That section reads, "Claims which have been allowed may be reconsidered for cause and re-allowed or rejected, in whole or in part, according to the equities of the case, before but not after the estate has been closed." The Lower Court said in commenting upon this Section, "We find in the record no evidence of injury, prejudice or disadvantage to claimants which would make it inequitable to allow the trustee to file his petition for re-examination."

Re Star Spring Bed Co., 265 Fed. 137;
Globe Laundry Co., 198 Fed. 365;
Canton Iron & Steel Co., 197 Fed. 767.

We do not feel that petitioners in their petition have set up any grounds which would justify this Court in issuing its writs of certiorari upon this point.

III.

Re-examination of a Claim Already Re-examined in Part.

This is specification in error No. 5 on page 12 of the petition and brief of petitioners.

Re-examination is allowed under Clause 6 of General Order 21 and subdivision of Bankruptcy Act, Section 57 (l), both of which are quoted in the brief of argument. The procedure is governed by General Order 21. It will be noted that the proper procedure is by petition for re-examination. This is the first step. That petition, by familiar principles, must state the grounds of the Trustee's cause of action against the claimant. In this proceeding a valid ground for expunction of the $38,000.00 claim was stated, which re-

sulted in its being expunged. Filed with the $38,000.00 claim was another claim for $15,000.00 which is now being attacked. Was the former proceeding an adjudication of the present issue which bars this proceeding?

The decree in the former proceeding was upon a cause of action which stated the invalidity of the claim of $38,000.00 upon a note signed by the bankrupt. The decree sought in this proceeding is upon the validity or invalidity of an entirely separate note endorsed by the bankrupt for $15,000.00. Not only is the cause of action distinct but the grounds for the decree will be based on an utterly different issue. This renders the plea of res judicata ineffectual.

> "The effect of a judgment or decree as res judicata depends upon whether the second action or suit is upon the same or a different cause of action. If upon the same cause of action, the judgment or decree upon the merits in the first case is an absolute bar. * * * But if the second case be upon a different cause of action, the prior judgment or decree operates as an estoppel only as to matters actually in issue or points controverted, upon the determination of which the judgment or decree was rendered."—Baltimore S. S. Co. vs. Phillips, 274 U. S. 316.

In Cromwell vs. County of Sac, 94 U. S. 351, it was early held that a suit on bonds and coupons was not res judicata on matters not actually litigated in the former suit, by reason of a decree determining fraud in the issuance of the bonds.

In Adams vs. Adams, 25 Minn. 72, there was a suit to recover on one of a series of notes. The defendant pleaded illegality of consideration. The plaintiff replied with a plea of res judicata on a default judgment on a former note of the series. Held that as con-

sideration need not be alleged, it was not determined by the former suit and there was no estoppel.

In Independent Harvester Co. vs. Tinsman, 253 Fed. 935, the Harvester Company brought a bill to cancel a series of notes for fraud. A judgment was obtained by defendant in a different court on one. The fraud was not pleaded as a defense in this proceeding. The Court held that fraud was not res judicata in the cancellation suit because it was a different cause of action.

In Jacobson vs. Miller, 41 Mich. 90, an opinion by Judge Cooley, it was held that a former suit for an installment of rent, determined in plaintiff's favor, did not support a plea of res judicata to a defense of non est factum, where this defense was not made in the former suit, because the present suit was on a different cause of action.

In this estate a claimant filed his deposition upon two notes to establish his right to a part of the funds administered. This gave rise to two distinct causes of action in the Trustees, one flowing from each note. Each cause of action was the primary right in the Trustee to question the validity of each note as a claim against the estate. It was no more necessary for him to file a petition to expunge both notes at the same time than it was for him to file, at one time and in the same petition, exceptions to all claims filed in the estate. We therefore submit that the plea of res judicata is unavailing against this petition for re-examination of the Rutherford claim.

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied in all four of the above cases.

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